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No. 00-189

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States

STATE OF IDAHO,
*Petitioner*,

v.

UNITED STATES OF AMERICA
AND COEUR D'ALENE TRIBE,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT COEUR D'ALENE TRIBE

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Respondent Coeur d'Alene Tribe ("Coeur d'Alenes" or "Tribe") submits this brief in support of the decision below.

## STATEMENT

This case arises out of a nine-day bench trial in which the district court admitted and considered several thousand exhibits. The district court held that under the facts and circumstances of this case, as demonstrated by the evidence, the presumption of state ownership of submerged lands had been overcome by "compelling evidence demonstrating the Federal Government's intent to reserve the submerged lands [of part of Lake Coeur d'Alene] for the benefit of the Tribe." Appendix to Petition for Certiorari ("Pet. App.") at 61 (internal quotation marks omitted). Petitioner did "not challeng[e] the district court's factual findings" on appeal. Pet. App. 4. Nor did petitioner challenge the district court's "conclusion that executive actions reflect a clear intent to include the submerged lands within the 1873 reservation." *Id.* Petitioner rather has challenged the district court's and the court of appeals' conclusion that Congress's actions reveal a clear intent to defeat state title to the submerged lands.

In this context, petitioner's Statement is incomplete and improper. Relevant facts are omitted. Other evidentiary matters argued below, but rejected by the district court, are discussed as if still at issue. Relevant statutes, congressional committee reports, and Executive reports to Congress are either not addressed, or addressed only in limited ways that omit portions pertinent to this Court's consideration. The following Statement is more complete.[1]

**1. Historic Facts/Dependence on Waters.** From time immemorial the people of the Coeur d'Alene Tribe or

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[1] This Statement is generally organized by dates so that the Table of Contents of the Statement also serves as a timeline of events for this fact-intensive case.

"Schee-chu-umsch" lived on some 3.5 million acres in an area now known as northern Idaho and eastern Washington. In the heart of the Coeur d'Alenes' aboriginal homeland was a large lake (Lake Coeur d'Alene or "Lake"), fed by two large navigable rivers (Coeur d'Alene River and St. Joseph River) and drained by a third (Spokane River). *See* Joint Appendix ("J.A.") at 541 (aboriginal area outlined, showing forests, prairies, lakes, rivers, and anthropological sites). The Tribe's villages were built around its Lake and rivers. The Coeur d'Alenes were a water people.[2] The district court made specific factual findings regarding the Coeur d'Alenes' dependence on the waters and their resources, including the following:

> To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual,

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[2] Archaeologist expert Dr. Sprague testified that the Coeur d'Alenes were more dependent on the waters for survival than were other plains or plateau tribes involved in submerged lands ownership cases, such as the Crow, *see United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977) (per curiam); *Montana v. United States*, 450 U.S. 544, 556 (1981) (holding the Crow Tribe was not dependent for survival on the waters), and the Flathead, *see Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) (holding that the Confederated Salish & Kootenai Tribes were dependent on the waters for survival). *See* J.A. 10-12 (relevant portion of Dr. Sprague's testimony).

religious and social life centered around the Lake and rivers.

. . . .

. . . Archaeological, ethnographic and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d'Alenes located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.

. . . The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. Furthermore, the Coeur d'Alenes depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices.

Pet. App. 47-48 (citations and internal quotation marks omitted). This was the nature of the Coeur d'Alenes' life when Jesuit Missionaries established a mission in the 1840's and became the first white men to reside permanently in their area.

**2. 1848/1853/1863 Recognition of Aboriginal Title/1853 Negotiation Authorization Statute.** Congress expressly recognized the unextinguished Indian or aboriginal title of the northwest Indian tribes such as the Coeur d'Alenes in 1848 when undisputed United States domain over the Pacific Northwest was established (and it did so several times subsequently as well). *See* Act of August 14, 1848, 9 Stat. 323, J.A. 263 (Oregon territorial act governing area at issue); Act of March 2, 1853, 10 Stat. 172, 173, J.A. 263-264 (Washington territorial act governing this area); Act of March 3, 1863, 12 Stat. 808, J.A. 264 (Idaho territorial act governing this area).

In 1853 Congress specifically authorized the Executive to treat with western Indian tribes to extinguish aboriginal title to their lands. Act of March 3, 1853, 10 Stat. 238, J.A. 265,

App. 3a to this Brief. Pursuant to this congressional authority, Territorial Governor Isaac Stevens negotiated and entered into treaties with numerous northwest tribes in 1855. Governor Stevens intended similarly to treat with the Coeur d'Alenes in 1855, but was called away because of hostilities in central Washington. *See* J.A. 265-66 (1890 House of Representatives Report), 335-44 (attached Mullan letter).

**3. 1858 Peace Treaty and 1867 Executive Order Reservation.** In 1858, hostilities broke out between the Coeur d'Alene Tribe and the United States. These hostilities ended in a "treaty of peace and friendship" between the United States and the Coeur d'Alene Tribe. J.A. 23-25 (1858 Peace Treaty). The Coeur d'Alenes promised to return items captured from the troops, give hostages, and allow "white persons [to] travel through their country unmolested." J.A. 23-24. In return, the United States recognized the Coeur d'Alenes and promised to make a permanent treaty with the Tribe. J.A. 24. In 1867 a small reservation was set aside for the Coeur d'Alenes by President Johnson, although this was done without the Tribe's knowledge or consent. Pet. App. 50; J.A. 46-47 (1867 Executive Order).

**4. 1870's Negotiation Pressure/1873 Dependence on Waters.** In the early 1870's pressure built for the formal treaty which had been authorized by Congress in 1853 and promised the Tribe by Colonel Wright in 1858. In 1871 and 1872, Coeur d'Alene Chief Seltice wrote two petitions to the Commissioner of Indian Affairs. The first asked that an area of land be chartered "exclusively for us." Pet. App. 50 (first Seltice petition). The second made clear that the area must include their waters because "we need have some hunting and fishing." Pet. App. 50-51; J.A. 27 (second Seltice petition). In 1873 a government surveyor warned of "trouble" if the "fisheries" were not included in the Coeur d'Alene Reservation. Pet. App. 52; J.A. 30 (surveyor letter); *see also* J.A. 31 (accompanying map).

The district court specifically held that in 1873 the Coeur d'Alenes were dependent on the water resources for survival. Pet. App. 49-54. The district court found as follows:

> Based on all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived.

Pet. App. 54.

**5. 1873 Negotiation/Agreement/Executive Order/1884 Plat.** In 1873, the United States sent a negotiating team to treat with the Coeur d'Alenes. The team consisted of General Shanks, Chairman of the Indian Affairs Committee of the United States House of Representatives, Governor Bennett, territorial Governor of the Idaho Territory, and Agent Monteith, the north Idaho Indian agent. Agreement was reached. J.A. 32-37 (1873 Agreement). It provided that the 1867 Reservation would be enlarged to include most of the Tribe's Lake and portions of its rivers near the Lake, but not adjacent farmland to the south and west.[3] *Id.; see also* J.A. 541 (map of aboriginal area and of 1867 and 1873 Reservations showing prairie or farmland in yellow). The northern boundary ran "down along the center of the channel of said Spokane River" from where the River "leaves the

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[3] The formal document was an "Agreement" rather than a "Treaty" because in 1871 the House of Representatives demanded more of a say in Indian policy. After that date the United States made "Agreements" with Indian tribes to be ratified by both the House and Senate, rather than treaties ratified only by the Senate. Executive Orders continued to be used until 1919. F. Cohen, *Handbook of Federal Indian Law* 105-07, 127-28 (1982 ed.).

Coeur d'Alene lake" and was described in terms of water features so as necessarily to include the Lake and portions of the rivers in the Reservation.[4] J.A. 33-34 (1873 Agreement). In this Agreement the Tribe agreed to locate on the Reservation and to cede to the United States its aboriginal territory outside of the reservation. J.A. 34-35. The 1873 Agreement stated that it would not take effect until ratified by Congress. J.A. 36-37.

In late 1873 President Grant formally set apart by Executive Order an identical Coeur d'Alene Reservation, "mirror[ing]" the 1873 Agreement, until Congress could consider the Agreement. Pet. App. 66; J.A. 43-45 (Executive Report to Congress), 47-48 (Executive Order). The 1873 Executive Order Reservation was formally surveyed in 1883 and platted by 1884 by the General Land Office. Three unique features of that survey and plat indicate that the Lake was intended to be considered part of the reservation: (1) the survey did *not* meander the Lake or navigable rivers as would normally be done if those waters were being held for eventual transfer to a state; (2) the acreage of the Lake was included in the total acreage of the reservation; and (3) the northern boundary ran down the middle of the channel of the Spokane River. Pet. App. 57-58, 63; J.A. 49 (plat), 536 (enlargement), 12-22 (testimony of Surveyor Expert Willett).

**6. 1873 Purposes/Submerged Lands Necessary.** The evidence established, and the district court found, that in 1873 there were four purposes or objectives for creating the Coeur d'Alene Reservation. They were (1) to create a homeland reservation for the exclusive use of the Coeur d'Alenes, Pet. App. 64; (2) to convince the Tribe to settle on that

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[4] The fact that the Lake and the Tribe both bear the "Coeur d'Alene" name is no coincidence. Why give a lake the Tribe's name—which literally translated means "Heart of an Awl" and was intended to mean "hard bargainers," *see* Pet. App. 74 n.20—unless those of the day felt the Lake belonged to the Tribe?

reservation, Pet. App. 60-61, 64; (3) to convince the Tribe to cede its aboriginal lands for white settlement, Pet. App. 61, 64-65; and (4) to keep the peace, Pet. App. 61. Including the Lake and rivers as part of the Reservation was necessary to achieve all of these federal purposes. Inclusion of these submerged lands in the reservation was necessary to create a homeland exclusively for the Coeur d'Alenes because the Coeur d'Alenes were a water people dependent on the waters for survival. Pet. App. 54; Statement ¶ 4 (Coeur d'Alenes dependent on waters for survival in 1873). Inclusion of the submerged lands in the Reservation was necessary to convince the Coeur d'Alenes to settle on the reservation, to cede their remaining aboriginal lands, and to keep the peace because it was the *consideration* demanded by the Tribe to come to terms. "[T]he Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and [effecting] extinguishments of aboriginal title by agreeing to a reservation that included the submerged lands." Pet. App. 61. This district court finding was specifically supported by a letter of Governor Bennett, one of the United States' negotiators, stating the Tribe "*demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River," Pet. App. 56-57 (emphasis in original); J.A. 38 (Bennett letter) (emphasis in original), and by a report by Agent Monteith, another of the United States negotiators, that "by running down the Spokane [River, the Tribe] can put the mills at the upper falls at much less expense than building a steam mill." Pet. App. 56.

Petitioner *did not challenge* below the finding that the 1873 Executive Order reserved the submerged lands for the Tribe. Pet. App. 4 n.3 ("the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"); Pet. Br. 17 ("the State conceded, for purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive

Order Reservation to include submerged lands"). The district court was correct in its unchallenged finding that "the actions of the Executive reflected a clear intent to retain for the benefit of the Tribe the submerged lands within the 1873 reservation." Pet. App. 66.

**7. 1886 Dispute over Liquor Sales on the Lake.** An incident in 1886 demonstrates without question that those at the highest levels of the Executive branch understood Lake Coeur d'Alene itself to be included in the Reservation. In the mid-1880's steamboats carrying miners and supplies to the newly discovered gold and silver mines upstream of the Reservation began crossing Lake Coeur d'Alene pursuant to the 1858 Peace Treaty's consent to allow non-Indians to cross the Tribe's country "unmolested." J.A. 52-58 (Report of Lt. Col. Lazelle), 24 (1858 Peace Treaty). But the steamers were selling liquor to the miners on board as they crossed the Lake through the Reservation. This led to an investigation of the unlawful selling of liquor on an Indian reservation. The federal action taken was described in a series of letters among the Attorney General, the Secretary of the Interior, and the Secretary of War. J.A. 52-61. The Attorney General described the sale of liquor on Lake Coeur d'Alene as a "prima facie violation of Section 2139 Revised Statutes prohibiting the introduction of ardent spirits within the Indian country." J.A. 60. As the district court stated, "[b]ecause government officials considered the Lake and rivers lying within the outer boundaries of the 1873 reservation to be 'Indian country,' the transportation or distribution of liquor on board the steamboats constituted a violation of the Intercourse laws." Pet. App. 69. Without question, the Executive considered Lake Coeur d'Alene to be part of the Reservation in 1886.

**8. 1886 Negotiation Authorization Statute.** In 1885 Chief Seltice wrote the President and Congress, petitioning on behalf of the Coeur d'Alenes (a) that "a proper treaty of peace and friendship" be entered into; (b) that proper and full

compensation for "their lands not now reserved" be paid; and (c) that the "present reserve may be confirmed to them." J.A. 346-52 (Chief Seltice Petition). The petition made mention of Lake Coeur d'Alene. J.A. 348 ("It includes the Coeur d'Alene Lake and Coeur d'Alene River . . . .").

Rather than simply ratify the Coeur d'Alene Agreement negotiated in 1873, Congress chose to delegate by a statute a new negotiating commission to negotiate with not only the Coeur d'Alenes, but also a number of other interior northwest tribes as to whom negotiations had been previously authorized in 1853, but treaties had not been concluded or finalized. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51 (statute). As to the Coeur d'Alenes, the 1886 statute (1) authorized negotiations to obtain their consent to the relocation of the Spokanes and Pend d'Oreilles on the Coeur d'Alene Reservation, (2) authorized negotiations for cession of their aboriginal lands "outside the limits of the *present* Coeur d'Alene reservation," and (3) required that all agreements be ratified by Congress. J.A. 50-51 (statute) (emphasis added). This reference to "the present Coeur d'Alene Reservation" was the first congressional recognition and acknowledgment of the Coeur d'Alene Reservation established in 1873. J.A. 50-51.

**9. 1887 Negotiations/Agreement.** In 1887 the federal negotiators met with the Coeur d'Alenes. Agreement was reached. J.A. 62-115 (Coeur d'Alene report, Agreement, and transcript). The parties did *not* renegotiate the Reservation boundaries, or Lake ownership, simply referring to the existing Reservation. *See* J.A. 91-96 (preamble and Articles 1, 2, 3, 4, 5, 12, 13). The Coeur d'Alenes agreed to cede their aboriginal lands "except the portion of land within the boundaries of their *present* reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." J.A. 92 (Art. 2) (emphasis added). The Tribe also gave its consent that neighboring tribes could "be removed to the Coeur

d'Alene Reservation." J.A. 92 (Arts. 3 & 4). The parties agreed that "the Coeur d'Alene Reservation shall be held forever as Indian land," and that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 93 (Art. 5 of 1887 Agreement). Finally, the Agreement provided that "[t]his agreement shall not be binding on either party until ratified by Congress." J.A. 96 (Art. 14 of 1887 Agreement).

The 1887 Agreement and supporting documents were submitted to Congress by the Executive in early 1888. J.A. 62-115. The Executive Report to Congress explained that the interest in land created by Article 5 of the Agreement which could block transfer was arguably "unnecessary, inasmuch as no such thing would happen," but that it was included to calm "fears" and "allay suspicion" and, "in as strong a manner as possible, [to] bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently." J.A. 87.

**10. 1886–1887 Purposes/Submerged Lands Necessary.** The two congressional purposes or goals in the 1887 Agreement were stated on the face of the 1886 negotiation authorization statute itself. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51. They were (1) to obtain the consent of the Coeur d'Alene Tribe for the Spokane and Pend d'Oreille Indians to relocate onto the Coeur d'Alene Reservation, and (2) to obtain "the cession of [the Coeur d'Alene Tribe's] lands outside the limits of the present Coeur d'Alene reservation to the United States." *Id.* Further, petitioner has conceded "that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands." Pet. Br. 17. And Congress expressed its intent not to alter the Reservation by its reference to the "present Coeur d'Alene reservation" in the statute. J.A. 50-51.

**11. 1888 Senate Questions and Interior Responses.** Instead of immediately ratifying the 1887 Agreement, the Senate, by resolution, asked the Secretary of the Interior a number of questions about the Agreement. J.A. 116-17. Those questions included (1) what was "the extent of the present area and boundaries" of the reservation, (2) whether the reservation "includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers," and (3) "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." J.A. 117.

The Secretary of the Interior promptly filed a thorough response. The Secretary included a report from the Commissioner of Indian Affairs and three important maps. J.A. 118-33 (Interior response), 134-36 (accompanying maps). The Reports informed Congress of the Reservation boundaries, J.A. 122-23, of the Government's understanding that the Lake and at least some of the rivers were navigable and in the reservation, J.A. 123-24, and that the United States could, in all probability, successfully negotiate for the release of "some or all" of these waters upon payment, J.A. 129-30.

The district court explained the importance of this exchange between Congress and the Executive regarding the inclusion of the submerged lands in the Reservation:

> The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the "navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers." Ex. 187 at 693. The Commissioner of Indian Affairs, responding in detail, answered in the affirmative. It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers.

Pet. App. 77 (footnote omitted). In short, there can be no doubt that Congress had *pre-statehood* notification that the submerged lands were included in the Coeur d'Alene Reservation.[5]

**12. 1888 Railroad Right-of-Way Statute.** Three months after receiving notice that Lake Coeur d'Alene and the rivers were part of the Reservation, Congress again specifically recognized and acknowledged the Coeur d'Alene Reservation. In May 1888 Congress enacted a statute granting the Washington and Idaho Railroad, a subsidiary of the Union Pacific, a conditional right of way "through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (quoted material at 137). This was the *first* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew that the reservation included the submerged lands. The statute made the grant conditional on approval by the Tribe and payment to the Tribe for the right-of-way land. J.A. 138-39 (Section 3 of statute). In other words, Congress treated the Coeur d'Alene Reservation as a permanent, fully recognized reservation that required tribal consent and payment before land could be taken, even by act of Congress.

**13. 1889 Negotiation Authorization Statute.** The Senate ratified the 1887 Agreement in 1888, J.A. 141-43 (Congressional Record of Senate vote), but the House of Representatives did not, J.A. 269-70 (1890 House of Representatives Report stating reasons why House did not ratify 1887 Agreement). Instead, in early 1889 Congress by

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[5] While the document described was a response to the Senate, it is also contained in the *pre-statehood* report of the House of Representatives, so both bodies had notice that the submerged lands were part of the Reservation *before* Idaho became a state. J.A. 262-358 (House report), 298-313 (attached Interior response); *see also* Pet. App. 77 n.22.

statute directed the Secretary of the Interior to negotiate again with the Coeur d'Alenes. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. The 1889 statute stated Congress's objectives and specifically recognized and acknowledged the Reservation by authorizing negotiations for "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."[6] *Id.* (emphasis added). Despite the Senate's earlier question about submerged lands, Congress did *not* direct the Secretary of the Interior to obtain a cession of the Lake or submerged lands. Congress sought only mineral and timber lands. *Id.* As with the railroad right-of-way statute the year before, this 1889 negotiation authorization statute specifically recognized the permanent nature of the Coeur d'Alene Reservation by acknowledging that both tribal consent and compensation were required. *See id.* ("as such tribe shall consent to sell"). The Secretary of the Interior issued negotiating instructions that went further, suggesting that submerged lands might be sought but leaving the details to the negotiators. J.A. 147-49. This 1889 negotiation authorization statute was the *second* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew the Reservation included the submerged lands. It was the statute relied upon by the district court and the court of appeals as the basis for their decisions. Pet. App. 74-84 (district court), 21-23 (court of appeals).

**14. 1889 Negotiations and Cession Agreement.** In the summer of 1889 the United States' negotiating team met with the Coeur d'Alenes. Agreement was reached ceding the desired mineral and timber lands in the northern portion of

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[6] Petitioner bases much of its argument on the premise that this statute "repudiated the Reservation." Pet. Br. 21; *see also* Pet. Br. 37, 39. This is simply not correct. The act specifically recognized the Coeur d'Alene Reservation and authorized negotiations in an effort to acquire a part of it.

the reservation from the Tribe to the United States. J.A. 162-172 (President and agency report), 172-76 (negotiators' report), 176-97 (transcript of negotiations), 197-201 (Agreement), 202 (map of reservation and ceded areas). The Agreement did *not* negotiate a new reservation, but rather defined the area to be ceded from the existing reservation. J.A. 197-98 (1889 Agreement § 1).

The transcript shows that lake ownership was specifically negotiated. J.A. 182-83 (part of transcript of 1889 negotiations). The United States first proposed a form of common interest or permissive use of the Lake by the Tribe, essentially along the lines of what would result if lake ownership were to pass to the state at statehood. This was specifically rejected by the tribal negotiator, Chief Seltice:

> General SIMPSON. . . . . We have looked at the land, and would like to know now what you will take for it, if the other treaty is ratified.
>
> [Chief] SALTISE [*sic*]. Where will you make the lines?
>
> General SIMPSON. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you. You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 182-183. The United States negotiator General Simpson then changed positions, stating that the United States was willing to let the Tribe keep the St. Joseph River and the southern part of the Lake:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted].

> Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.
>
> [Chief] SALTISE. I do not quite like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk.

J.A. 183. A map of this United States proposal is set forth at J.A. 538. Although agreement was not reached on the precise boundaries proposed by the United States in this exchange, the agreement that was reached in 1889 used the same boundary as to the Lake and St. Joseph River as was proposed by General Simpson in the quoted text. *Compare* J.A. 538 (map of Simpson proposal) *with* J.A. 540 (map of final agreement) *and* J.A. 202 (map given to Congress). The 1889 Agreement described the area to be ceded with reference to water features in such a way so as necessarily to include the submerged lands at issue in this case. J.A. 198 (boundary description in Agreement), 202 (map of cession provided to Congress). The southern boundary of the cession divided the ceded area from the remainder of the Reservation, starting at the Washington border and running "thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation." J.A. 198 (boundary description); *see* J.A. 202 (map provided to Congress showing cession line crossing the Lake). This description necessarily included the submerged lands in the remaining Reservation and was in accordance with General Simpson's statement that the Tribe would keep ownership of the southern portion of the Lake and the St. Joseph River. J.A. 183 (transcript); Pet. App. 75-76 (explaining southern boundary of area ceded). The undisputed evidence established that if the intent had been to *exclude* the Lake and river

from the remaining Reservation, the description would have kept running south to the end of the Lake and up the St. Joseph River and then down the other bank of the St. Joseph River and along the east shore of Lake Coeur d'Alene to the Coeur d'Alene River. J.A. 16 (testimony of Surveyor Willett).

**15. 1889 Purposes/Submerged Lands Necessary.** The specific congressional purposes or goals of the 1889 Agreement were stated on the face of the negotiation authorization statute itself. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. Congress wished to obtain the "release by said [Coeur d'Alene] tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id.* There is *no* mention in the statute of any congressional desire to obtain the release of any portion of the Lake or any of the rivers, even though Congress had been informed by the Secretary of the Interior only a year earlier that those navigable waters were within the reservation. *Compare id.* (1889 statute) *with* J.A. 123 (1888 Interior response that submerged lands were part of reservation). Indeed, the district court found that "[r]etention of the submerged lands was necessary to achieve the United States' [1889] objective . . . ." J.A. 80; *see infra* p. 34 (quoting district court).

**16. 1890 Pre-Statehood Congressional Action.** The Executive sent the 1887 and 1889 Agreements, reports, maps, transcripts, and supporting material to Congress in late 1889. J.A. 162-261. In March 1890 the House of Representatives' Committee on Indian Affairs issued an extensive report on the bill to ratify the two Agreements. J.A. 262-358. The Committee Report explained that the House of Representatives had not passed the 1888 bill ratifying the 1887 Agreement (unlike the Senate which had passed the bill, J.A. 141-43) because of a concern that the mining areas and transportation routes on the Lake for the ore ought to be

excluded from the Reservation, which the Committee understood had been "specially dedicated to the exclusive use of said Indians under the Executive order of 1873." J.A. 269. The Committee explained the background and status of relations between the United States and the Coeur d'Alene Tribe, J.A. 262-358, including the 1873 Executive Order reservation, J.A. 269, and the 1888 response from the Secretary of the Interior that the submerged lands were in the Reservation, J.A. 298-313. The report explained the desire to ratify the Agreements "in strict conformity with the terms of and in strict conformity with the request of said Indians," J.A. 270. The report finally discussed the proposed ratification of an earlier Agreement between the Tribe and Mr. Frederick Post. J.A. 271-72.

The Committee's conclusion was to "recommend the passage of this bill, the object of which is to ratify and confirm two certain agreements heretofore made with the Coeur d'Alene Indians in Idaho Territory." J.A. 262. The Senate passed an identical bill on June 7, 1890. J.A. 359-67. When the matter was considered by the full House on June 10, 1890, however, confusion arose over whether the body should consider the House bill or the just-passed Senate bill. J.A. 368-69. The result was to table the matter until the confusion could be cleared up. *Id.*

**17. 1890 Idaho Statehood Act/Constitution.** Less than a month after the Senate and House considered ratification of the Coeur d'Alene Agreements, Congress "accepted, ratified and confirmed" the Idaho Constitution and admitted Idaho to the Union "on an equal footing with the original states . . . ." Act of July 3, 1890, 26 Stat. 215, J.A. 370-71. The Idaho Constitution had specific provisions regarding the Indian property that Congress had excluded from the Idaho territory in 1863. *See* J.A. 264 (1890 House of Representatives Report quoting portions of 1863 Idaho Territorial Act). In particular,

the Idaho Constitution, which Congress ratified in the Statehood Act, states in part as follows:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

J.A. 370-71 (Idaho Constitution, Article XXI, § 19).

By this provision, the state disclaimed lands "owned or *held*" by an Indian tribe and recognized the "absolute jurisdiction and control of the Congress" over such *"Indian* lands." *Id.* (emphasis added). The interplay among (1) these disclaimers, (2) the 1873 Executive Order creating the Reservation, J.A. 47-48, (3) the provisions of Article 5 of the 1887 Agreement, which states that the reservation was "Indian land" that could not be "otherwise disposed of" without the consent of the Tribe, J.A. 93, and (4) the 1889 negotiations where the Tribe specifically rejected the United States' proposal that the Lake be held in common and the United States made clear that the southern portion of the Lake and St. Joseph River would remain the Tribe's, J.A. 183 (transcript), is central to this case.

**18. 1890 Post-Statehood House Report And 1891 Ratification.** A month after Idaho statehood the House Committee on Indian Affairs submitted a new report regarding the Senate bill ratifying the 1887 and 1889 Coeur d'Alene Agreements. J.A. 373-75 (August 1890 House report). The new House Report explained that the House bill for which approval was recommended in March was "exactly the same" as the Senate bill passed in June. J.A. 373 (August 1890 House report). The Committee recommended passage

of the Senate bill. This August 1890 Committee report also attached the entire March 1890 report. J.A. 374. This included the portion of the March report which made clear Congress's understanding that Lake Coeur d'Alene was within the Coeur d'Alene Reservation, J.A. 269, and its intent that the ratification bill be in strict conformity with the Agreements and the wishes of the Indians, J.A. 374. The inclusion of the pre-statehood Committee report in the post-statehood Committee report and their conformity with one another demonstrate that congressional understanding and intent throughout this period—including at the time of statehood—were that Lake Coeur d'Alene and its tributaries were reserved to the Tribe and did not pass to the State.

On March 3, 1891, Congress passed the statute ratifying the 1887 Agreement, the 1889 Agreement, and an 1871 Agreement between the Tribe and Frederick Post regarding the conveyance of certain submerged lands in the Spokane River. Act of March 3, 1891, 26 Stat. 989, 1026, J.A. 376-88. This statute formally created the special fee-like land status for the Tribe in the Reservation. J.A. 379 ("no part of said reservation shall ever be sold . . . or otherwise disposed of" without tribal consent). It made effective for the first time—and after statehood—the cession of the aboriginal lands contained in the 1887 Agreement, for that Agreement provided that it was not to be "binding on either party until ratified by Congress." J.A. 382 (1887 Agreement provision contained in statute). It made effective for the first time—and after statehood—the cession of the submerged lands in the northern part of the Reservation contained in the 1889 Agreement. J.A. 384.

The 1891 statute also made effective for the first time—and after statehood—the conveyance from the Tribe to Frederick Post of a "portion of said reservation." J.A. 387 (statute), 388 (affidavit in statute referring to "portion of the reservation"). Specifically, the statute directed the convey-

ance of the area described in an affidavit from Chief Seltice which was part of the statute. The affidavit described the area as "all three of the [Spokane] river channels and islands, with enough land on the north and south shores for water-power and improvements." J.A. 388 (Chief Seltice Affidavit quoted in statute). This statute makes clear that Congress understood that the reservation included the submerged lands, *and* that the inclusion of the submerged lands in the Reservation extended after statehood. Otherwise, Congress could not have transferred the "three of the river channels" to Frederick Post nine months after statehood.[7]

**19. Harrison Strip Cession.** In 1893 Congress authorized negotiations with the Coeur d'Alene Tribe for the cession of a strip of land on the northeast portion of the Reservation including the town of Harrison. Act of March 3, 1893, 27 Stat. 616. Agreement was reached. J.A. 389-402 (Harrison Cession Agreement and Report). The plat of the cession included a portion of the submerged lands which gave Harrison the ability to have a port. J.A. 403. The district court found that "[a] cession that included the lake bed would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

**20. Matters Outside the Record.** At pp. 2-5 of its brief, petitioner inappropriately discusses numerous twentieth-century matters outside the record in an effort to build support for its position. None of these matters was raised at trial. In

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[7] The Secretary of the Interior later issued a patent to Frederick Post for this portion of the Spokane River (which the district court found was "at all times [a] navigable watercours[e]," Pet. App. 42). *See* J.A. 404-07 (text), 408 (map). This is now the site of a large hydroelectric dam owned by Frederick Post's successor in interest, Avista Corp. (formerly Washington Water Power). It is an indefensible disparity that petitioner, though challenging for more than a quarter-century the Tribe's title to the submerged lands, has never challenged the similar title of this corporation, even though the corporation's title can have no legitimacy if the Tribe's title has none.

fact, *at petitioner's request*, exhibits after 1894 were specifically *excluded* from evidence. *See* State's Motion to Strike, Docket No. 119 (seeking to strike post-statehood exhibits and explaining that district court's prior order limiting post-statehood evidence was made at petitioner's request); July 9, 1998 Order, Docket No. 131 (striking post-statehood exhibits at petitioner's request and explaining that "[a]t trial, the Court ruled that with the exception of evidence relating to the Harrison cession in 1894, it would not consider post-statehood evidence").[8] In effect, the district court drew the evidentiary line at the beginning of the twentieth century. *Id.* One piece of proposed twentieth-century evidence is instructive in this regard. Exhibit 2254 was a 1902 letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior regarding a company's request to construct log booms for sorting logs by driving pilings into the bed of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation. *See* App. 4a-12a to this Brief. The letter explained that it was the United States' position that the company had to obtain the consent of the Tribe and pay the Tribe for the privilege of so using its Lake and river. *Id.* Even though Exhibit 2254 clearly showed the contemporary understanding (only twelve years after statehood) of the United States and those who lived and worked around the Reservation that the Lake belonged to the Tribe, the Exhibit was stricken at *petitioner's* request and over the Tribe's objection. *See* Docket Entry Nos. 119 (Petitioner's Motion to Strike), 128 (Tribe's objection), 131 (Order striking Ex. 2254). Particularly after successfully limiting the record to nineteenth-century events, it is truly

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[8] The Joint Appendix having been designated prior to the filing of petitioner's brief, these filings were omitted from the "Relevant Docket Entries." J.A. 1-5. Accordingly, a list of Supplementary Relevant Docket Entries is set forth at App. 1a-2a to this Brief. All filings, exhibits, and briefs, including the filings here noted, have been forwarded by the courts below to this Court pursuant to its February 16, 2001 directive.

extraordinary that petitioner would seek so to disregard the record. *See* Stern, Gressman, et al., *Supreme Court Practice*, 555-56 (7th ed. 1993).

Some of the twentieth-century items referred to by petitioner are state statutes, others are held out as "facts." As for the former, post-statehood statutes of a state legislature cannot alter what submerged lands did or did not pass to the state at statehood. *Brewer-Elliott Oil & Gas v. United States*, 260 U.S. 77, 88 (1922) (a state in dealing with the general subject of beds of streams may not legislate in a way which would destroy a title already accrued under federal law). Further, if the statutes had been raised and addressed at trial, the evidence would have shown not only that they were scarcely contemporaneous with the relevant events in this case (unlike, for example, the 1894 Harrison cession or the 1902 Executive branch letter), but also that they were not implemented as petitioner implies. As for the latter, many, if not all, of the twentieth-century "facts" asserted by petitioner are simply wrong or misleading. Indeed, if these various matters had been addressed at trial, the evidence would have shown that petitioner largely ignored Lake Coeur d'Alene over the last century.[9] For instance, if petitioner's alleged

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[9] For instance, during the first twenty-five years of its statehood, the state did not even claim ownership of the submerged lands underlying navigable lakes and rivers. *United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933) ("Under the law of Idaho at the time of statehood . . . the riparian owner upon a stream, both navigable and non-navigable, takes title to the bed of the stream.") This same rule applied to navigable lakes during that period. *Donovan-Hopka-Ninneman Co. v. Hope Lumber Co.*, 194 F. 643 (9th Cir. 1912). This remained the law until 1915 when it was overruled in *Callahan v. Price*, 146 P. 732 (Idaho 1915). It certainly is any state's right to let riparian or littoral owners hold title to the submerged lands underlying navigable waters. *Shively v. Bowlby*, 152 U.S. 1 (1894). But it is a bit much for petitioner to assert a "special relationship to the Lake" (Pet. Br. 3) when the state long did not claim ownership of submerged lands underlying navigable waters during the period at issue.

stewardship of Lake Coeur d'Alene had been an issue at trial (*compare* Pet. Br. 3-4), the evidence would have shown that petitioner did little to stop the pollution of the Lake and bird-feeding areas by upstream mine waste.[10] If petitioner's asserted regulation of Lake Coeur d'Alene had been an issue at trial, the evidence would have shown that petitioner began regulating encroachment on the Lake only *after* the United States and the Tribe asserted ownership of the Lake more than a quarter-century ago. *Compare* Idaho Code § 58-1301 et seq. (state encroachment permit statute enacted in 1974) *with In re Application for License of the Washington Water Power Company*, Project No. 2545, Federal Power Commission (now FERC) (granting intervention by the United States, April 24, 1973, and intervention by the Tribe, September 14, 1973, to seek relief based on ownership of Lake). In short, especially since it was petitioner who sought and obtained an Order at trial limiting evidence to matters in the nineteenth century, petitioner's assertions in its brief of twentieth-century matters outside the record are improper and misleading and should be disregarded.

**21. Canons of Construction.** The Court has articulated specific canons of construction under which the foregoing treaties or agreements and statutes are to be construed. It is a longstanding rule that treaties or agreements are to be construed as the Indians would have understood them. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979) (an Indian treaty is a "contract between two sovereign nations" in which

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[10] Major ongoing litigation by the Tribe and the United States is seeking to clean up this pollution. *Coeur d'Alene Tribe v. Asarco, et al.*, No. 91-342 (D. Idaho); *United States v. Asarco, et al.*, No. 96-0122 (D. Idaho), *on interlocutory appeal*, 214 F.3d 1104 (9th Cir. 2000). These cases have been consolidated for trial and bifurcated as to some issues. The trial of this multi-billion-dollar case is currently in progress. The state settled a similar claim against many of the same defendants for a mere $4.5 million.

"intention of the parties . . . must control" and must be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").[11] Further, "statutes passed for the benefit of Indians are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (citing *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992)); *accord Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

## SUMMARY OF ARGUMENT

The submerged lands of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation were reserved for the Tribe under the doctrine announced in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), and reaffirmed in *United States v. Alaska*, 521 U.S. 1 (1997). The clear federal intent was to include the submerged lands in the Reservation and to defeat state title to the submerged lands, thus satisfying the requirements of *Utah* as also reflected in *Alaska*. The submerged lands were also reserved for the Tribe under the alternative analysis announced in *Alaska* of Congress's explicitly recognizing an executive reservation that clearly included the submerged lands. *Alaska*, 521 U.S. at 44. Here, Congress explicitly recognized the reservation in two pre-statehood statutes and also at statehood, and Congress did so after it knew the reservation included the submerged lands. Unless *Alaska* is to be called into question,

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[11] The need for this canon is shown in this case by the fact that federal interpreter Felt, who certified that the 1887 Agreement had been "carefully read and fully explained to the Indians," could not even sign his own name—he signed with "his mark." J.A. 98.

the decisions of the courts below that state title to the submerged lands at issue was defeated should be affirmed.

## ARGUMENT

The courts below correctly applied existing precedents in determining that under the particular circumstances of this case the United States defeated state title to submerged lands. There are also several other bases for affirming the judgment below.[12]

### I. BY RESERVING THE SUBMERGED LANDS FOR THE TRIBE UNDER THE *UTAH* ANALYSIS AS REAFFIRMED IN *ALASKA*, THE UNITED STATES DEFEATED STATE TITLE.

Applying this Court's precedents to the circumstances of this case establishes that the submerged lands at issue were reserved by the United States for the benefit of the Tribe, thus defeating petitioner's title at statehood.[13] *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v.*

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[12] A basis of the Tribe's ownership of these submerged lands that is not discussed here is the doctrine of unextinguished aboriginal title. The issue was raised below, but neither the district court not the court of appeals found it necessary to reach the issue. *See* Pet. App. 84 n.27 (district court) (explaining that "[i]n light of the Court's conclusion" that the Federal Government retained title, court "need not decide" aboriginal title argument); Pet. App. 13 (court of appeals) (to same effect); Brief in Opposition of Respondent Coeur d'Alene Tribe, at 7 n.4. The Coeur d'Alene Tribe's aboriginal title to the area shown at J.A. 541 was confirmed in *Coeur d'Alene Tribe v. United States*, 4 Indian Claims Commission 1 (1955). The Tribe recognizes, however, that some aspects of its aboriginal title argument may raise questions that are more appropriately addressed in the first instance by the lower courts in this case.

[13] References in this Argument section to the foregoing Statement will simply be by paragraph number (*e.g.*, "Statement ¶ 5").

*Alaska*, 521 U.S. 1 (1997). The question of whether state title to submerged lands could be defeated by a federal *reservation* of submerged lands was left open in *Utah*, 482 U.S. at 201, and answered in the affirmative in *Alaska*, 521 U.S. at 33-34. These cases establish that a future state's title to submerged lands was defeated by a federal reservation if there could be shown (1) clear intent to include the submerged lands in the reservation and (2) clear intent to defeat state title. *Utah*, 482 U.S. at 202; *Alaska*, 521 U.S. at 36, 41, 44 (Petroleum Reserve), and 50 (Wildlife Refuge). In this case, as in *Alaska*, both prongs of the analysis are satisfied.

### A. There Was a Clear Intent to Include Submerged Lands Within the Reservation.

The first prong of the *Utah* analysis—clear intent to include the submerged lands in the reservation—was conceded below by petitioner.[14] *See* Pet. App. 4 n.3 ("For

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[14] *Utah* and *Alaska* analyzed this first prong—intent to include the submerged lands in the reservation—by examining (1) whether the boundary of the reservation was described with reference to water features that necessarily included the submerged lands and (2) whether inclusion of the submerged lands was necessary to accomplish the purposes for which the reservation was created. *Utah*, 482 U.S. at 202; *Alaska* 521 U.S. at 41. In these circumstances, it is appropriate that petitioner has conceded this prong. In this case, the boundary *was* described with reference to water features that necessarily included the submerged lands. *See* Statement ¶ 5. Inclusion of the submerged lands in the reservation was also necessary for the purposes for which the reservation was created. One purpose was to create a homeland for the exclusive use of the Coeur d'Alene people. The Coeur d'Alenes were dependent on the waters for survival, so inclusion of the submerged lands was necessary to accomplish the purpose of creating a homeland for the exclusive use of the Tribe. *See* Statement ¶ 4 (dependence on the water), ¶ 6 (1873 purposes); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (appropriate to include submerged land in Indian Reservation of tribe dependent on fishing). Inclusion of the submerged lands in the reservation was necessary to accomplish the other purposes for which the reservation was created, maintained, and altered because it was the consideration

purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"). This concession by petitioner that the 1873 Reservation included the submerged lands applies to the 1887 and 1889 Agreements as well, for there was no change in the 1873 Reservation until Congress acted in 1891. The 1886 statute authorized additional negotiations with the Tribe. It did *not* direct any modification of the 1873 Reservation. *See* Statement ¶ 8. The 1888 Executive notification to Congress that the submerged lands were included as part of the 1873 Reservation did not modify the 1873 Reservation. *See* Statement ¶ 11. The 1889 statute directing additional negotiations to seek cession by the Tribe of mineral and timber lands did not modify the 1873 Reservation or even seek any cession or release of the submerged lands or Lake from the 1873 Reservation. *See* Statement ¶ 13. The 1889 Agreement did provide for an eventual reduction of the Coeur d'Alene Reservation when ratified, but the transcript of the negotiation made clear that even then the submerged lands at issue in this case were to remain part of the Reservation. *See* Statement ¶ 14. The 1890 Statehood Act/Constitution made clear that unextinguished Indian lands, surely including lands such as the 1873 Reservation which had been specifically set apart, were to remain under the absolute ownership and control of the United States. *See* Statement ¶ 17. Even *after* statehood Congress understood the submerged lands to be part of the Reservation when it conveyed "a portion of said reservation" including "all three rivers channels" to Mr. Frederick Post. Statement ¶ 18. Only in March 1891 when the 1887 and 1889 Agreements were ratified was the 1873 Reservation in any way reduced, but even then the submerged lands

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demanded by the Tribe and understood by Congress before the Tribe would agree to the United States' objectives or purposes. *See* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

remained part of the Reservation under the 1889 Agreement. *See* Statement ¶ 14. In short, both the Executive and Congress understood at all relevant times that the submerged lands were part of the Coeur d'Alene Reservation.

### B. There Was a Clear Intent to Defeat Future State Title to the Submerged Lands.

This second prong of the *Utah* analysis—whether there was a clear intent to defeat a future state's title to the submerged lands—was addressed in *Utah* by examining whether defeat of state title to the submerged lands was necessary to accomplish Congress's goals or objectives. *See Utah*, 482 U.S. at 203, 208 (concluding that defeat of state title to submerged lands in reservation was not necessary to accomplish objective of preventing "monopolization and speculation" of uplands or "subsequently developing a reservoir or water reclamation project"). This second prong of the *Utah* analysis was also addressed in *Alaska* by variously considering (1) whether "Congress was aware" at statehood that the reservation included the submerged lands, *see Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge); (2) whether "defeating state title to submerged lands was necessary to achieve the United States' objective," *id.* at 42-43 (Petroleum Reserve), 58-59 (Wildlife Refuge); and (3) whether Congress retained ownership and exclusive jurisdiction at statehood or at least foreclosed state use, *id.* at 41-42 (Petroleum Reserve), 57-59 (Wildlife Refuge). All these considerations—which are not separate tests but rather considerations taken up in *Alaska* to ensure that the analysis of congressional intent is properly focused—are satisfied in this case.

#### 1. Congress Was Aware at Statehood That the Reservation Included Submerged Lands.

In examining the second prong of the *Utah* analysis—whether there was a clear intent to defeat the future state's

title to the submerged lands—the Court in *Alaska* reviewed whether Congress knew that the reservation at issue included the submerged lands. *See Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, Congress knew in 1888—two years prior to statehood—that the Coeur d'Alene Reservation included the submerged lands. *See* Statement ¶ 11 & n. 5 (discussing 1888 Interior Response to congressional inquiry). After describing the exchange between Congress and the Secretary of the Interior, the district court here pointedly found that Congress was on notice that the submerged lands were part of the Reservation. "It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers." Pet. App. 77.

Congress also knew before statehood that Lake Coeur d'Alene and St. Joseph River would remain within the Reservation under the 1889 Agreement. In 1889 the Executive transmitted to Congress documents supporting a request for ratification of the 1887 and 1889 Agreements. J.A. 162-261. This included the transcript of the 1889 negotiations where the United States' negotiator agreed that the Tribe would "still have the St. Joseph River and the lower part of the lake" and a map of the Reservation and cession. Statement ¶ 14 (1889 Agreement Negotiations); J.A. 183 (transcript); J.A. 202 (map). Without question Congress knew at statehood that the Coeur d'Alene Reservation included the submerged lands.

**2. Defeat of State Title to Submerged Lands Was Necessary to Achieve the United States' Objective or Purposes.**

A second consideration in determining the second prong of the *Utah* analysis—clear intent to defeat the future state's title

to the submerged lands—is whether it was necessary to the government's goals or objectives for state title to the submerged lands to be defeated. For example, in *Utah*, the Court concluded that defeat of a future state's title was not necessary to achieve the federal objectives of preventing "monopolization and speculation" and "subsequently developing a reservoir or water reclamation project." *Utah*, 482 U.S. at 203, 208. By contrast, in *Alaska*, the Court concluded that defeat of state title was necessary as to the Petroleum Reserve at issue there in order to achieve the federal objective of "preserv[ing] the Government's ability to extract petroleum resources," and as to the Wildlife Refuge in order for a federal agency to be able to effect the "preservation of wildlife and wilderness resources." *Alaska*, 521 U.S. at 42, 46 (internal quotation marks omitted). *Alaska* also noted the importance of correctly stating the true government purposes for creating the reservation. *See id.* at 42 (noting that state had misstated federal purpose for creating reservation).

It is appropriate in this case to review the specific federal purposes or objectives in each of the three time periods—*viz.*, in 1873 when the submerged lands were initially reserved, in 1886–1887 when the 1887 Agreement was authorized by Congress and negotiated, and in 1889 when the 1889 Agreement was authorized by Congress and negotiated. Defeat of a future state's title to the submerged lands was necessary to accomplish federal purposes or objectives at each stage, and the 1886 and 1889 statutes should be interpreted in light of this.

There were several federal purposes for creating the Coeur d'Alene Reservation in 1873. One was to create a homeland for the Coeur d'Alenes, a water-dependent people. Defeat of state title was necessary to accomplish this objective because the Coeur d'Alenes relied upon their fishery and other water resources for survival. *See* Pet. App. 49-54; Statement ¶¶ 1, 4. The other federal purposes in 1873 were "promoting

settlement, avoiding hostilities and extinguishing aboriginal title."[15] Pet. App. 61; *accord* Statement ¶ 6. These federal purposes or objectives could only be achieved if the Tribe agreed to them, and that required, as the district court stated, "the Federal Government['s] . . . agreeing to a reservation that included the submerged lands." Pet. App. 61. And just as accomplishing these goals required inclusion of the submerged lands in the Reservation, so too did it require defeat of the future state's title to these submerged lands. Again, tribal assent was necessary to furthering these federal objectives, and, from the Tribe's perspective, not intending to defeat the future state's title would have been the same as *excluding* the Lake from the reservation in the first place. In either case, the Tribe would have been relegated to a permissive-use or common-interest status with regard to the Lake. This is what the evidence showed was unacceptable to the Tribe. *See* J.A. 30 (surveyor's letter); Pet App. 52 (findings regarding surveyor's letter); J.A. 38-41 (Governor Bennett's letter); Pet. App. 56-58 (findings regarding Governor Bennett's letter); Statement ¶ 6 (summarizing this evidence and these findings). Defeat of the future state's title to the submerged lands in the 1873 Reservation was thus necessary to accomplish the United States' purposes or objectives.

In 1886–1887, the federal goals were set out on the face of the 1886 statute authorizing negotiations. Those federal goals were (1) to obtain the Coeur d'Alenes' consent to neighboring tribes relocating on the Coeur d'Alene Reservation, and (2) to obtain the "cession of [Coeur d'Alene] lands outside the limits of the *present* Coeur d'Alene reservation to

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[15] Petitioner's discussion of the purposes of the 1873 Reservation completely ignores these three federal purposes which the district court found could be accomplished only by including the submerged lands in the 1873 Reservation. *See* Pet. Br. 44-48.

the United States."[16] J.A. 50-51 (emphasis added). The reference to the "present" reservation evidences a congressional realization that the only way the United States could accomplish its objectives was to leave intact the 1873 Reservation and everything included in it. *See* Statement ¶ 10 (1886–1887 purposes).

In 1889 the federal goals were again set out on the face of a negotiation authorization statute. They were to obtain mineral and timber lands.[17] *See* J.A. 144; Statement ¶ 13 (negotiation authorization statute), ¶ 15 (1889 purposes). In the exchange between Chief Seltice and 1889 negotiator General Simpson, the Tribe expressly rejected the same type of ownership status for the Lake as would result if the submerged lands passed to the state at statehood:

> General SIMPSON. . . . . You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 183; Statement ¶ 14. The Coeur d'Alenes, who the district court found were "[k]nown for their sagacity," Pet. App. 74, demonstrated in this exchange their rejection of a permissive-use or common-interest status for the Lake. General Simpson, seeing that he could not achieve his

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[16] Here, too, petitioner completely ignores the expressed congressional goals and the clear way Congress dealt with them. *See* Pet. Br. 44-48.

[17] Petitioner acknowledges only in passing these express statutory goals of obtaining mineral and timber lands in the 1889 negotiation authorization act. Pet. Br. 46. Instead, petitioner urges that Congress's goal in the 1889 statute was to "protect the Tribe's agricultural lands." *Id.* But the only protection of the Tribe's agricultural interests in the statute was that the federal negotiators were told to leave the farmland alone. *Id.* This is not protection; it is simply a directive to do no damage.

objective of the cession of the mineral and timber lands if he insisted on such a status for the Lake, changed his approach immediately and dramatically. The following is his response to Chief Seltice's foregoing statement:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted here].
>
> *Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.*

J.A. 183 (emphasis added); *see* J.A. 538, 540 (maps showing boundaries described as to Lake and St. Joseph River identical to boundaries eventually agreed upon) *and* J.A. 202 (map of Reservation after 1889 cession, attached to 1889 Executive Report to Congress regarding 1887 and 1889 Coeur d'Alene Agreements). In these circumstances, it is clear that defeat of state title would be necessary for the United States to accede to the Tribe's rejection of the common-interest status such as would result from ownership of the Lake passing to the state at statehood. Furthermore, General Simpson's specific reference to the land surrounding the St. Joseph River ("meadow and agricultural land along the St. Joseph River") makes clear that the earlier references to the St. Joseph River were to the river itself. Ownership of the Lake and St. Joseph River thus was part of the consideration demanded by the Tribe in exchange for ceding the mineral and timber lands sought by Congress.[18] *See* Statement ¶ 15. As the district court stated:

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[18] Petitioner suggests (Br. 47) that defeat of state title would not be necessary to acomplish a federal purpose of providing "fishing opportunities for the Coeur d'Alene Tribe" because tribal members could fish under state ownership and regulation. The argument fails because something very different was bargained for and agreed to as the consideration required to acomplish Congress's specific purposes as

> Retention of the submerged lands was necessary to achieve the United States' objective, [*Alaska*, 117 S.Ct.] at 1910 [521 U.S. at 42-43], and Congress clearly contemplated continued federal ownership of those lands, *id.* at 1917 [521 U.S. at 55-59]. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is compelling evidence that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated [in 1889] its intent to reserve the submerged lands under federal control by ratifying the Executive inclusion of the submerged land within the 1873 reservation. *See Alaska*, 117 S. Ct. at 1910-11, 1915-17 [521 U.S. at 43-45, 53-59].

Pet. App. 80-81 (citation and footnote omitted).

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shown by the above-quoted exchange between General Simpson and Chief Seltice. In other words, the agreement was that the Lake and river would be part of the Reservation not subject to any other regulatory authority or use. *Compare Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (barring state regulation of tribal fishing in waters reserved for the tribe in *Alaska Pacific Fisheries*, 248 U.S. 78 (1918)). Defeat of state title and regulatory authority over these waters was the consideration demanded and offered to accomplish Congress's purposes in 1889.

In short, defeat of state title to the submerged lands was necessary to achieve the United States' objectives or purposes.[19]

### 3. Congress Kept Exclusive Jurisdiction Over and Ownership of the Reservation in the Idaho Statehood Act.

The third consideration used in *Alaska* in assessing the second prong of the *Utah* analysis—clear intent to defeat the future state's title to the submerged lands—is whether Congress kept ownership of and jurisdiction over the reservation at statehood. *See Alaska*, 521 U.S. at 41-42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, as in *Alaska*, Congress retained ownership of and jurisdiction over the Reservation. Specifically, Article XXI, § 19 of the Idaho Constitution (J.A. 371-72), which Congress ratified in the Idaho Statehood Act (J.A. 370), is a disclaimer by Idaho of Indian land:

> [T]he people of the state of Idaho do agree and declare that we *forever disclaim* all right and title . . . *to all lands* lying within said limits *owned or held* by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said *Indian lands* shall remain *under the absolute jurisdiction and control* of the Congress of the United States . . . .

J.A. 371 (emphasis added). There can be no doubt that the Coeur d'Alene Reservation, which had been specifically "set apart as a reservation for the Coeur d'Alene Indians" by

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[19] Amici Counties suggest (Br. 22-23) that a "public exigency" is required for Congress to be able to defeat state title. First, *Alaska* made clear that public exigency is only a congressional policy, not a constitutional requirement. *Alaska*, 521 at 40. Second, the district court explained why any public-exigency requirement was satisfied in this case. Pet. App. 60-61.

Executive Order, J.A. 47-48, was "held by any Indians or Indian tribes" or that it was "Indian lands" as referred to in the Idaho Constitution. Article 5 of the 1887 Agreement stated that the "Coeur d'Alene Reservation shall be *held* forever as *Indian land*." J.A. 93 (emphasis added). In these circumstances, the Idaho Statehood Act, ratifying the Idaho Constitution, disclaimed both ownership and jurisdiction as to the Coeur d'Alene Reservation, just as the Alaska Statehood Act disclaimed ownership and jurisdiction as to the two reservations in *Alaska*.[20]

The disclaimer does not turn, with regard to the Coeur d'Alene lands, on whether Congress had yet finally acted to approve the 1887 and 1889 Agreements. In this regard, it is helpful to recall that the reservation of the Wildlife Reserve in *Alaska* had not even been finalized at statehood. *Alaska*, 521 U.S. at 59. There was merely an application for a reservation. Here, as just recounted, there is much more. The Coeur d'Alene Reservation had been completely reserved by Executive Order and further had been expressly recognized by Congress several times, twice after learning that the submerged lands were included in the Reservation. J.A. 137-40 (1888 WIRR right-of-way statute); J.A. 144 (1889 negotiation authorization statute). Just as the disclaimer in *Alaska* was not limited to "completed reservations," *Alaska*, 521 U.S. at 59, so too the Indian disclaimer here is not limited to reservations where Congress

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[20] This Court found a similar state disclaimer of Indian lands, coupled with a prior reservation, to defeat state regulatory authority which would have existed if the state had owned the submerged lands. *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 369 U.S. 45, 57-59 (1962) (holding reservation of submerged lands addressed in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), coupled with Indian disclaimer clause in Alaska Statehood Act, defeated state's ability to regulate fish traps on submerged lands). *Compare Kake v. Egan*, 369 U.S. 60 (1962) (reaching opposite result where there was no prior reservation).

had already *conveyed* title to a tribe (as would subsequently occur in this case in 1891, *see supra* Statement ¶ 18; *infra* Part II.B.3, when Congress ratified the 1887 and 1889 Agreements), but includes, as just recounted, the Tribe's Executive Order reservation of which Congress was aware.

* * * *

In summary, the facts of this case establish that future state title to the submerged lands at issue was defeated by Congress under both prongs of the *Utah* reservation analysis used in *Utah* and *Alaska*. The first prong was conceded by petitioner below. The second prong was satisfied by Congress's being informed that the Reservation included the submerged lands, by the fact that defeat of state title to the submerged lands was necessary to accomplish the federal purposes and objectives, and by the federal government's keeping ownership of and jurisdiction over the Reservation at statehood. Congress's intent that the submerged lands be included in the Reservation and state title be defeated has been "definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). The presumption of state ownership of submerged lands has thus been overcome.

## II. THE UNITED STATES RESERVED THE SUBMERGED LANDS FOR THE BENEFIT OF THE TRIBE UNDER THE ALTERNATIVE *ALASKA* ANALYSIS.

Although the foregoing adequately supports affirmance of the judgment, other grounds exist as well. In particular, in *Alaska* this Court articulated an alternative method for analyzing whether state title to submerged lands had been defeated by an Executive reservation. Specifically, after setting forth the foregoing test—stating that "there would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's

statehood, provided it satisfied *Utah Div. of State Lands*' requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title"—the Court in *Alaska* also stated thus: "It follows that Congress could achieve the same result [of defeating state title to submerged lands] by explicitly recognizing, at the point of Alaska's statehood, an executive reservation that clearly included submerged lands." *Alaska*, 521 U.S. at 44. This is, in fact, the analytical approach applied by the district court and the court of appeals. Pet. App. 78-81 & n.25 (district court); Pet. App. 21-23 (court of appeals).

### A. Congress Was Notified That the Executive Reservation Clearly Included Submerged Lands.

In *Alaska*, the Court first looked at whether "Congress [was] on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Alaska*, 521 U.S. at 45. This point is beyond dispute in this case. In 1888, two years before statehood, the Department of the Interior informed Congress that the submerged lands were part of the Reservation. *See* Statement ¶ 11. A second *pre-statehood* notice to Congress that the submerged lands had been included in the Coeur d'Alene Reservation was the 1889 Message from the Executive to Congress contained in the documents supporting ratification of the 1887 and 1889 Agreements. *See* J.A. 162-261; Statement ¶ 14. It included the transcript of the 1889 negotiation exchange between Chief Seltice and General Simpson previously quoted showing that the parties' intent had been and continued to be that the submerged lands were part of the Reservation. J.A. 182-83; *see* Statement ¶ 14; *supra* pp. 32-33. *Further, the map attached to this Executive report to Congress even showed the reservation boundary*

*bisecting the Lake, including the southern part of the Lake and lower St. Joseph River in the Reservation. See* J.A. 202; *compare Alaska*, 521 U.S. at 56 (discussing map provided to Congress showing submerged lands in Wildlife Refuge). Without doubt these documents gave Congress *pre-statehood* notice "that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" in the 1873 Executive Order Coeur d'Alene Reservation. *Alaska*, 521 U.S. at 45.

### B. Congress Explicitly Recognized the Coeur d'Alene Reservation Both Before and at Statehood.

Congress "explicitly recogniz[ed]," *Alaska*, 521 U.S. at 44, the Coeur d'Alene Reservation twice before statehood and again at statehood. *See* Statement ¶ 12 (discussing Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (pre-statehood statute granting railroad right of way through the Coeur d'Alene Reservation)); Statement ¶ 13 (discussing Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144 (pre-statehood statute authorizing negotiations with Coeur d'Alenes for the cession of some of the land in their reservation)); Statement ¶ 17 (discussing Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-372 (statehood statute ratifying state Constitution which disclaimed ownership of and jurisdiction over Indian land)).[21] The district court and court of appeals both based their decisions on the 1889 negotiation authorization statute. Pet. App. 78-79 (district court); Pet. App. 21-23 (court of

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[21] Amici Counties suggest (Br. 21) that President Grant had no authority to issue the 1873 Executive Order, citing an Attorney General's Opinion predating President Grant's Order. This argument not only was not raised below and not only flies in the face of concessions by the party that *amici* support, but also is beside the point because of the three express congressional recognitions of the Executive Order Coeur d'Alene Reservation that are cited in the text immediately preceding this footnote.

appeals). Any one of these three recognitions of the Reservation satisfies the explicit-congressional-recognition standard of *Alaska*.[22]

### 1. Congress Explicitly Recognized the Coeur d'Alene Reservation *Before Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Twice before statehood Congress explicitly recognized the Coeur d'Alene Reservation *after* it knew the Reservation included the submerged lands. On February 9, 1888, the Secretary of the Interior responded to Congress that most of Lake Coeur d'Alene—along with the Coeur d'Alene and St. Joseph Rivers—was in the Coeur d'Alene Reservation and could probably be released through further negotiation and payment. J.A. 118-36. Congress expressly recognized the Coeur d'Alene Reservation three months after Congress was thus informed that the Reservation included the submerged lands: On May 30, 1888, Congress specifically recognized the Reservation when a statute was passed granting the Washington and Idaho Railroad a right of way through the

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[22] Amici Counties suggest (Br. 15) that prior congressional authorization is required before the Executive can reserve submerged lands and that such authority existed in *Alaska*, 521 U.S. at 41-42. Amici are wrong on both counts. This Court in *Alaska* assumed that the state's argument was correct that the Pickett Act did not authorize the Executive's reservation of the Petroleum Reserve, but still found the state's title to the submerged lands had been defeated. *Alaska*, 521 U.S. at 43-44. In all events, in this case there was prior congressional authorization for the Executive to treat with northwest Indian tribes such as the Coeur d'Alenes. *See* Statement ¶ 2 (discussing Act of March 3, 1853, 10 Stat. 238 (authorizing treaty negotiations), App. 3a to this Brief). Prior to statehood Congress noted that the intent had been to treat with the Coeur d'Alenes in 1855, but circumstances prevented it. J.A. 265-66 (Committee statement), 335-44 (Mullan letter). In this case there thus was greater congressional authorization for the Executive's reservation than in *Alaska*.

Coeur d'Alene Reservation, conditioned upon the railroad's obtaining tribal consent and making appropriate payment to the Tribe. *See* Statement ¶ 12; Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 ("An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation").[23] The second pre-statehood congressional recognition of the Coeur d'Alene Reservation *after* Congress knew the Reservation included the submerged lands was in 1889, when Congress statutorily authorized negotiations with the Coeur d'Alene Tribe to seek "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for mineral and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, 25 Stat. 980, 1002, J.A. 144 (emphasis added).

Both of these statutes recognized the Tribe's particular interest in the reservation by requiring both consent and payment before land or an interest in land could be purchased from the Tribe.[24] As the district court stated, "[b]y

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[23] The first time that the Coeur d'Alene Reservation was explicitly recognized by Congress was two years earlier in 1886 when Congress authorized negotiations with the Coeur d'Alenes to obtain their consent for the "removal" of neighboring tribes to the "Coeur d'Alene reservatio[n]" and to negotiate with the Coeur d'Alenes for cession "of their lands outside the limits of the *present* Coeur d'Alene reservation to the United States." Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50 (emphasis added). However, this 1886 congressional recognition of the Coeur d'Alene Reservation is insufficient to establish the congressional-recognition element, just as the congressional action in *Utah* was insufficient, because when it was taken, "Congress was not on notice that [the Executive] had reserved the bed of the lake." *Alaska*, 521 U.S. at 44-45 (explaining why United States' claimed reservation of Utah Lake was rejected in *Utah*).

[24] Petitioner contends that the Tribe's interest in the Reservation was mere use and occupancy, suggesting it was nothing more than a generalized recognition of the Tribe's aboriginal rights. Pet. Br. 42-44. Congress's requirement of consent and payment indicates it understood the Tribe to have a greater legal interest in the Reservation.

authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress [in 1889] acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress recognized and then ratified the Executive reservation of the submerged lands for the benefit of the Tribe." Pet. App. 78. The court of appeals also carefully articulated Congress's recognition and acknowledgment of the Coeur d'Alene Reservation in the 1889 negotiation authorization statute:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation—boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands—including submerged lands—within the 1873 reservation . . . .
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> In short, Congress "otherwise made very plain," *Holt State Bank*, 270 U.S. at 55, its intention regarding the submerged lands . . . . Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible.

Pet. App. 21-23 (emphasis in original). These two pre-statehood statutes are express congressional recognition of

the Coeur d'Alene Reservation *after* Congress knew the Coeur d'Alene Reservation included the submerged lands.

Petitioner and Amici Counties, by contrast, urge a standard that was not articulated in *Alaska* and that would not have allowed the result in *Alaska*. They suggest that the statute in which Congress acknowledges a reservation that it knows includes submerged lands must specifically refer to submerged lands. *See* Pet. Br. 40-42; Amici Counties Br. 22. Not only is this not what *Alaska* held, but if it were the standard, *Alaska* would have had a different result. In particular, as to the Petroleum Reserve in *Alaska*, Congress in § 11(b) of the Alaska Statehood Act made *no reference* to the submerged lands, only referring to the reservation "naval petroleum reserve numbered 4." *Alaska*, 521 U.S. at 41. This is a reference to "a 23-million acre federal reservation in the northwestern part of the State," *id.* at 32, and not "an express reference to submerged lands," as petitioner apparently believes, Pet. Br. 40. *See also Alaska*, 521 U.S. at 38-42 (making clear that Alaska Statehood Act does not *on its face* refer to submerged lands in Petroleum Reserve). Nonetheless, Congress was held to have defeated state title. The same is true here. The statutes in this case, which referred only to the reservation, meet the *Alaska* standard. *See* J.A. 137 (railroad right-of-way statute referring to "Coeur d'Alene Indian Reservation"); J.A. 144 (1889 negotiation authorization act referring to "its [*i.e.*, Coeur d'Alene Tribe's] reservation").

In short, in both the 1888 railroad statute and the 1889 negotiation authorization statute, Congress "explicitly recognized" the Coeur d'Alene Reservation, which was an "executive reservation which clearly included submerged lands." *Alaska*, 521 U.S. at 44.

### 2. Congress Explicitly Recognized the Coeur d'Alene Reservation *At Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Congress also explicitly recognized the Coeur d'Alene Reservation at statehood, again after it knew the Reservation included the submerged lands. As discussed above, Congress knew prior to statehood that the submerged lands were included in the Reservation. *See* Statement ¶ 11 (1888 Interior response to congressional inquiry whether submerged lands were in reservation); Statement ¶ 14 (1889 negotiation transcript showing submerged lands were to remain in reservation). On July 3, 1890, Congress "accepted, ratified, and confirmed the Idaho Constitution" and "declared" Idaho to be a state. Idaho Statehood Act/Constitution, Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-71; Statement ¶ 17. Article XXI, § 19 of the Idaho Constitution, ratified simultaneously with and as part of the grant of statehood, disclaimed title to land "owned or held" by any Indian tribe and disclaimed jurisdiction over "Indian land," with "absolute jurisdiction and control" remaining in Congress:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

J.A. 371 (Idaho Constitution, Article XXI § 19).

This specific recognition of federal ownership of and jurisdiction over the Coeur d'Alene Reservation has the same operative effect as the provisions of § 11(b) of the Alaska Statehood Act as to the Petroleum Reserve. In *Alaska*, this

Court held that "Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and which included the statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the reserve and defeat the State's title to those lands." 521 U.S. at 46. *Alaska* reached the same conclusion as to the Wildlife Refuge as well, this time based on § 6(e) of the Alaska Statehood Act. Specifically, the Court held that "Section 6(e) of the Alaska Statehood Act expressly prevented lands that had been 'set apart as [a] refug[e]' from passing to Alaska." *Alaska*, 521 U.S. at 61. In all three disclaimers—the two in *Alaska* and the one here—ownership and jurisdiction were disclaimed by the state. This is sufficient to defeat state title to submerged lands where Congress knew, at the time of statehood, that the submerged lands were included in the reservation. *See id.* at 46 (Petroleum Reserve); *id.* at 61 (Wildlife Reserve). State title to the submerged lands at issue here was similarly defeated by Congress's ratification in the Idaho Statehood Act of the state's disclaimer.

### 3. Congress's Post-Statehood Actions Reflect the Fact That It Had Previously Defeated State Title to the Submerged Lands.

Congress completed its ratification of the 1887 and 1889 Agreements in March 1891, eight months after statehood.[25]

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[25] In ratifying these two Agreements, Congress conveyed or granted the Reservation to the Tribe. Congress thereby granted to the Tribe a greater property interest in the Reservation than was conveyed to many other tribes. Often grants to Indian tribes by treaty or agreement conveyed only the right of use and occupancy. In approving the 1887 Agreement, by contrast, Congress conveyed to the Tribe a right that the Reservation could not be "sold . . . or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 379 (Article 5 of 1887 Agreement in ratification statute). This is in the nature more of fee title than of mere possessory interest of use and occupancy. *See Montana v. United States*, 450 U.S. 544, 555 n.5 (1981) (distinguishing the

Amici Counties suggest (Br. 22) that this post-statehood ratification "implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters." The circumstances of this case suggest just the opposite. Congress's ratification of the two Agreements demonstrates Congress's understanding that it had previously defeated state title to the submerged lands. That is the only way the House of Representatives' Committee Reports could accurately state —both before *and after* statehood—that the intent of the pending bill was to ratify the 1887 and 1889 Agreements "in strict conformity with the request of said Indians," which the 1889 transcript made clear required including the submerged lands.[26] J.A. 270 (pre-statehood report); J.A. 374 (post-statehood report reflecting fact of identical text); J.A. 183 (1889 transcript showing tribal understanding that submerged lands would be included in the Reservation); *see also* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

The relevance of Congress's action in 1891 is not that Congress then defeated state title: Congress had already done that in its 1888 railroad statute or in its 1889 negotiation-authorization statute or, at a minimum, in its 1890 statehood statute. In the 1891 statute, Congress merely conveyed that which had already been reserved and to which Congress had

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circumstances with the Crow Tribe, where only a possessory interest in reservation was conveyed and state title to submerged lands was not defeated, from circumstances in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), where fee title was conveyed and state title to the submerged lands was defeated). Petitioner's argument (Br. 42-44) that the Tribe's interest is merely one of "use and occupancy" is thus not correct.

[26] This report that the purpose of the statute was to ratify the Agreements "in strict conformity with the request of said Indians as recited in said treaties" is in keeping with the canons of construction that Indian treaties are to be interpreted as the Indians would have understood them. *See* Statement ¶ 21; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76 (1976).

already defeated state title. There is no reason to construe the various congressional acts (of 1888, 1889, 1890, and 1891) so as to conclude that Congress was undertaking a vain exercise when as part of its 1891 approval of the 1887 and 1889 Agreements it made clear that the Tribe had authority over the submerged lands at issue here. *See* Statement ¶ 18 (describing 1891 Act). Yet that is the construction that petitioner requires to win this case.[27]

That Congress intended *at or before* statehood to *defeat* state title to the submerged lands and *after* statehood to *convey* most of the lands to the Tribe is also made plain by Congress's direction in 1891 (in the ratification statute) that a patent be issued to Frederick Post for "a portion of said [Coeur d'Alene] reservation" that "included all three of the river channels" in the navigable Spokane River. J.A. 388 (authorization statute); *see* Statement ¶ 18 & n.7 (discussion of Frederick Post patent). Here, too, Congress was conveying land to which it had already preserved federal title. Finally, the 1893 congressional act authorizing the 1894 Harrison cession, in which the Tribe ceded a portion of the Lake, is a further reflection of the understanding of all at the time that

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[27] There is no analogue in *Alaska* to the 1891 statute in this case because in *Alaska* Congress never intended to convey the reserved lands; its purpose was to retain them for the United States. As a separate matter, it could also be suggested that, even though the ratification of the 1887 and 1889 Agreements occurred after statehood, the operative effect of those Agreements regarding the submerged lands related back to their date of execution in 1887 and 1889. The operative language in each Agreement was merely that they would "not be binding" until ratified. J.A. 96 (1887 Agreement); J.A. 199 (1889 Agreement). Relation back of these Agreements once ratified would be in keeping with the decisions in *Northern Pacific R.R. v. Wismer*, 246 U.S. 283, 288 (1918) (executive order creating Indian reservation effective on date of original agreement, not later date of issuance of Order), and *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 69-70 (1886) (agreement with Indian tribe "to be binding from its ratification" held to be effective from date approved by Executive branch, not later date of congressional ratification).

Congress had previously defeated state title. Statement ¶ 19 (Harrison Cession). As the district court found, "[a] cession that included the lake bed [at Harrison] would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

* * * *

In summary, *Alaska* establishes that state title to submerged lands is defeated "by explicitly recognizing, at the point of [the State's] statehood, an executive reservation that clearly includes submerged lands." 521 U.S. at 44. In this case, Congress was notified prior to statehood that the Executive "had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Compare id.* at 45. Possessed of this knowledge, Congress expressly recognized the Coeur d'Alene Reservation twice before statehood and once at statehood. Congress's intent that the submerged lands be included in the Reservation and state title defeated has been "definitely declared or otherwise made very plain." *Holt State Bank*, 270 U.S. at 55. The presumption against state ownership of submerged lands has been overcome.[28]

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[28] Amici Counties (Br. 25-28) suggest that the Tribe claims a right improperly to prohibit or regulate use of the Lake. In fact, non-tribal use of the Lake is guaranteed by the 1858 Peace Treaty, J.A. 24 (promise of Coeur d'Alenes that "all white persons shall travel through their country unmolested"), and by the predominant doctrine of navigational servitude, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-08 (1987) (explaining that the federal doctrine of navigatitional servitude is applicable to navigable waters held to be tribally owned in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)). Furthermore, the Tribe is not prohibiting use of the Lake, but it is appropriately regulating the Lake. *See* Coeur d'Alene Tribal Code Chapter 20 (fishing), 42 (Water Quality), 43 (Boating), and 44 (Encroachments) (2000 edition); *see also supra* p. 23 n.10 (demonstrating that Tribe has played leading role in seeking to force environmental clean-up of the Lake).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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